

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Wholesale Competition in Regions with            )                   Docket Nos. RM07-19-000  
Organized Electric Markets                         )                   AD07-7-000

**REQUEST FOR CLARIFICATION OF THE  
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

The New York Independent System Operator, Inc. (“NYISO”) respectfully requests that the Federal Energy Regulatory Commission (“Commission”) clarify the meaning of Section 35.28(g)(3)(v)(A) of its regulations, or take such other actions as it may consider necessary to ensure that the provision is not interpreted in a manner that imposes an undue burden on Independent System Operators (“ISOs”), Regional Transmission Organizations (“RTOs”), Market Monitoring Units, or on the Commission’s own Staff. Section 35.28(g)(3)(v)(A) was promulgated by Order No. 719.<sup>1</sup> The NYISO recognizes that the statutory deadline for seeking rehearing of Order No. 719 has expired and it is not seeking rehearing under Rule 713 of the Commission’s regulations.<sup>2</sup> Instead, the NYISO is asking that the Commission exercise its discretion to grant clarification of previously issued orders<sup>3</sup> and, to the extent necessary, to modify them *sua sponte*.<sup>4</sup>

---

<sup>1</sup> *Wholesale Competition in Regions with Organized Power Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008).

<sup>2</sup> *See* 18 C.F.R. § 385.713 (2008).

<sup>3</sup> *See, e.g., UBS AG*, 125 FERC ¶ 61,282 (2008) (granting request for clarification of several orders filed more than 30 days after their issuance); *The Goldman Sachs Group, Inc.*, 122 FERC ¶ 61,005; *New York Independent System Operator, Inc.*, 98 FERC ¶ 61,268 (2002). In addition, the Commission has sometimes exercised its discretion to treat pleadings that it deemed to be untimely requests for rehearing as “requests for reconsideration” and has entertained them on that basis. *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,383 at n. 8 (2005) (describing the Commission’s

## I. Request for Clarification

Section 35.28(g)(3)(v)(A) of the Commission's Regulations that becomes effective on December 29, 2008 provides, in pertinent part, as follows:

(A) A Market Monitoring Unit is to make a referral to the Commission **in all instances** where the Market Monitoring Unit has reason to believe market design flaws exist that it believes could effectively be remedied by rule or tariff changes.... [Emphasis added.]

The language of Section 35.28(g)(3)(v)(A) of the Commission's Regulations raises three concerns that the NYISO believes the Commission can address by providing appropriate clarification. First, Section 35.28(g)(3)(v)(A) of the Commission's Regulations could be read as precluding a Market Monitoring Unit from taking into account the severity of a market design flaw that it has identified, thus requiring it to report even non-material issues to the Commission. The NYISO requests that the Commission clarify that non-material issues do not constitute "market design flaws" that require referral. Second, the NYISO requests that the Commission clarify that, in order for a Market Monitoring Unit to form a reasonable and informed "belief" that a market design flaw exists, the Market Monitoring Unit should first, as a matter of due diligence, discuss its concern with the relevant ISO or RTO and determine if an actual market design flaw that needs to be remedied exists. Finally, in instances where the Market Monitoring Unit and ISO/RTO

---

precedent). To the extent that the Commission believes it more appropriate to entertain this filing as a request for reconsideration, the NYISO respectfully requests that it do so.

<sup>4</sup> Section 313(a) of the Federal Power Act provides, in relevant part:

Until the record in a proceeding shall have been filed in a court of appeals,...the Commission may at any time, upon reasonable notice and in such a manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act.

16 U.S.C. § 8251(a) (2000); *see ISO New England, Inc.*, 115 FERC ¶ 61,332 at P 8 (2006) (exercising the Commission's discretion under Section 313).

are able to timely and adequately resolve an identified concern, the Commission should clarify that no referral is required.

In order to avoid the unnecessary referral of (i) non-material matters; (ii) matters that do not reflect a market design flaw, and (iii) matters that the Market Monitoring Unit and ISO or RTO have discussed and are able to timely and adequately resolve, the NYISO requests that the Commission clarify that Section 35.28(g)(3)(v)(A) of its Regulations is only intended to require Market Monitoring Units to refer material market design flaws that, following discussions between the Market Monitoring Unit and ISO/RTO, the ISO or RTO is unable to timely implement an adequate remedy for. Granting the NYISO's request will make clear that Market Monitoring Units are not required to submit unnecessary referrals that would consume the time and resources of (a) the Market Monitoring Units that would have to prepare and submit them; (b) the ISOs and RTOs that would have to review and respond to them; and (c) the Commission Office of Enforcement Staff that would have to review each and every referral and gain a sufficient understanding of the underlying facts to reach a conclusion regarding the referred matter. Granting the clarifications that the NYISO has requested will permit the Commission to focus its limited enforcement resources on addressing more pressing and important issues or tasks, including Market Monitoring Unit referrals of material issues that Market Monitoring Units believe warrant the Commission's attention. The NYISO's requested clarification is consistent with the suggestion set forth on pages 24 and 25 of its September 14, 2007 Comments in this proceeding.

Alternatively, if the Commission determines that providing the NYISO's requested clarification would not adequately address the concerns identified above, the Commission could instead choose to act *sua sponte* by amending Section 35.28(g)(3)(v)(A). Should the Commission choose to act *sua sponte*, the NYISO offers the following proposed amendments to Section 35.28(g)(3)(v)(A) for the Commission's consideration:

(A) A Market Monitoring Unit is to make a referral to the Commission in all instances where, following discussion with the independent system operator or regional transmission organization, the Market Monitoring Unit has reason to believe a material market design flaws exist that it believes could effectively be remedied by rule or tariff changes, but that the Market Monitoring Unit believes the independent system operator or regional transmission organization will not address adequately and/or in a timely manner. The Market Monitoring Unit must limit distribution of its identifications and recommendations to the independent system operator or regional transmission organization and to the Commission in the event it believes broader dissemination should be avoided at that time.

## II. Conclusion

For the reasons set forth above, the NYISO respectfully requests that the Commission clarify the intended meaning of 18 C.F.R. § 35.28(g)(3)(v)(A) in the manner suggested above, and take any additional action that it deems necessary.

Respectfully submitted,

/s/ Alex M. Schnell  
Alex M. Schnell  
New York Independent System  
Operator, Inc.  
10 Krey Boulevard  
Rensselaer, NY 12144  
Ph: 518-356-8707  
Fax: 518-356-8825

/s/ Nicole Bouchez  
Nicole Bouchez, Ph.D.  
Manager, Market Monitoring &  
Performance  
New York Independent System  
Operator, Inc.

Dated: December 17, 2008

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated at Rensselaer, New York this 17<sup>th</sup> day of December, 2008.

/s/ Alex M. Schnell  
Alex M. Schnell  
New York Independent System Operator,  
Inc.  
10 Krey Boulevard  
Rensselaer, New York 12144  
518-356-8707